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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	IB Docket No. 95-91
	)	GEN Docket No. 90-357
	)	RM No. 8610
Establishment of Rules and Policies for the	)	PP-24
Digital Audio Radio Satellite Service in the	)	PP-86
2310-2360 MHz Frequency Band	)	PP-87

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COMMENTS OF THE MEDIA ACCESS PROJECT

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TABLE OF CONTENTS

SUMMARY

The Commission should encourage the introduction of DARS technology, but should temper its expectations with a degree of skepticism. MAP supports the implementation of DARS service to the extent that it can achieve some of the goals touted by its supporters - such as compact disc quality sound and service to unserved or underserved markets - but questions whether DARS can live up to its promised niche and special interest programming.

In fashioning a regulatory structure for DARS, it is critical that the Commission ensure that free, local broadcast radio remains a viable source of news, information, and entertainment. DARS technology will no doubt have profound financial effects on terrestrial broadcasters, with a possible negative net effect on the public's ability to receive free radio programming. Therefore, the Commission should implement whatever safeguards it deems necessary to protect and maintain the vitality of universal local, terrestrial broadcast radio.

Moreover, because DARS operators, like traditional broadcasters, use public spectrum to provide programming services to the public, MAP urges the Commission to regulate DARS under Title III. While MAP recognizes the necessary flexibility the Commission requires in tailoring a regulatory model for DARS, MAP nonetheless advocates that DARS providers, like broadcasters, be subject to public interest obligations such as providing access to federal and local political candidates, and ensuring that individuals who are personally attacked are provided the right to reply. To that end, the Commission should expressly overrule its *Subscription Video* decision and determine that subscription broadcast services are subject to public interest obligations.

Even if the Commission decides that DARS operators should not be regulated as broad-

casters, they should still be subject to public interest requirements. Regardless of whether DARS is classified as broadcasting, a non-broadcast entity, or common carrier, it should be subject to public interest requirements because it uses scarce public spectrum.

The United States District Court decision in *Daniels Cablevision v. FCC* is not a bar to the imposition of public interest requirements on DARS providers. The trial judge in *Daniels* struck down a very narrow non-commercial and educational set-aside for DBS providers, not the broad public interest obligations that MAP advocates here. Moreover, and in any event, *Daniels* was wrongly decided for the reasons laid out in the Commission's brief filed in the recent appeal of that case. The Commission can, consistent with the constitution, and indeed should, require DARS operators to provide educational and informational programming to the public as a condition of its use of the public's spectrum.

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COMMENTS OF THE MEDIA ACCESS PROJECT

Media Access Project ("MAP") respectfully submits these comments in response to the Commission's *Notice of Proposed Rulemaking*, FCC No. 95-229, (released June 15, 1995)("*NOPR*"). The *NOPR* asks a number of questions concerning issues involved in creating service and licensing rules for satellite-delivered digital audio radio service ("DARS").

DARS service, which has been allocated the 2310-2360 MHz band, is expected to provide multi-channel, multi-format digital radio service with sound quality equivalent to compact disks. *See Amendment of the Commission's Rules with Regard to the Establishment and Regulation of New Digital Audio Radio Services*, Report and Order, 10 FCC Rcd 2310 (1995)("*Allocation Order*"). It will "both compete with and complement traditional terrestrial AM and FM radio service." *NOPR* at ¶2. It will have the technological capability to "serve geographic areas that terrestrial radio does not reach," and will therefore serve individuals living in or traveling through these areas. *Id.* Moreover, the Commission hopes that DARS service providers could "target niche audiences that have not been served by traditional local radio." *Id.*

It is undeniable that DARS service has great potential to offer its subscribers added programming diversity, enhanced sound quality, and greater reception range. Yet, first of all, history counsels that similar, past promises of additional programming diversity by new services have been slow to materialize, and that benefits to civic discourse are often reduced by vertical integration and editorial control. Moreover, the Commission's ultimate duty remains to ensure that the public interest is served. It should create obligations on DARS operators to do so, and should create safeguards to protect terrestrial broadcasters' ability to continue to do so.[1]

I. THE COMMISSION SHOULD ENCOURAGE THE DEPLOYMENT OF DARS TECHNOLOGY, BUT SHOULD TEMPER ITS EXPECTATIONS WITH A DEGREE OF SKEPTICISM.

In creating DARS service rules, the Commission should not stand in the way of progress. Yet neither should it rush to embrace this new technology at the risk of not adequately insuring that DARS serves the public interest.

MAP supports the implementation of DARS service to the extent that it can achieve some of the goals touted by its supporters - such as compact disc quality sound and service to unserved or underserved markets. *See Allocation Order* at 2311, 2314; *NOPR* at ¶¶2, 12.

MAP also concurs with those who share the Commission's hope that DARS may increase the diversity of programming voices available to subscribers.[2] But some parties supporting DARS seek to go further: their vision of DARS includes niche radio programming - a means to serve underrepresented tastes, communities, and ethnic and minority groups. For example, several commenters to the spectrum allocation proceedings noted that DARS could "serve minority ethnic and cultural interests that might otherwise not receive programming directed to a narrow

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[1]MAP concurs with the comments being filed today by the Minority Media and Telecommunications Council ("MMTC") to the extent that they advocate that the FCC adopt various mechanisms to promote minority ownership of DARS services.

[2]It would be mistaken, however, to countenance the notion that the increased listening choice represented by DARS supplants the need for broadcast radio to encompass a diversity of viewpoints and to serve local communities. For 3 of the 4 current applicants, DARS service will be available only to those who can afford it and choose to subscribe.

audience." *Allocation Order*, 10 FCC Rcd at 2311. Others hope that DARS might someday serve non-English speaking audiences. *NOPR* at ¶12; *Allocation Order*, 10 FCC Rcd at 2314.

If all the promises of niche programming are realized, DARS could indeed be a boon to its subscribers with these underserved tastes and needs. Minorities, non-English speaking communities, or those listeners whose preferences do not fit commercially lucrative formats may perhaps be currently underrepresented by their local terrestrial radio stations. DARS undeniably has the potential to serve these listeners.

Yet the Commission should look at such promises with a healthy dose of skepticism. Similar arguments were made in support of cable programming. And while cable has provided some degree of increased program diversity, it has been very slow in realizing the expansive promises made by its early proponents, especially with respect to public service programming which enhances local civic discourse.[3] And any niche programmers who have not become established so far will face great difficulty doing so in the future.[4] Furthermore, any additional

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[3]Starting in 1975, satellite delivery of programming to cable headends "made it possible to economically deliver...a vast array of national programming services. These new services provided movies, sports, news and specialized programming directed to a number of individual segments of the national audience such as children, minorities, and senior citizens." Report of the House Energy and Commerce Committee, H.R. Rep. No. 934, 98th Cong., 2d Sess. at 21 (1984).

[4]This is because demand for carriage exceeds the limited supply of available channels on most cable systems. So although 1995 has seen a proliferation in niche cable networks, these programmers still face the imposing, twin hurdles of getting carriage on cable systems and gaining enough of an audience to remain commercially viable. *See, e.g.*, Rich Brown, *New cable networks ready for launch*, Broadcasting & Cable, April 11, 1994, at 24. One result, as the Senate Commerce Committee recently noted, is that some niche programmers can not "get carried on cable systems without relinquishing control of their product." 102d Cong., 2d Sess., S. Rep. No. 102-92 at 3 (1992). In other cases, niche programmers have been required to give cable operators exclusive carriage rights or added monetary consideration. *Id.* at 24.

diversity attributable to existing cable networks is reduced by vertical integration - a handful of major cable MSOs own and possess varying degrees of editorial control over many cable networks.[5] *See* Cable Television Consumer Protection and Competition Act, Pub.L. 102-385, §2(a)(5), 106 Stat 1460, 1460-61 (1992)("1992 Cable Act"); Report of the Senate Commerce, Science, and Transportation Committee, S. Rep. No. 92, 102d Cong., 2d Sess., at 25-26 (1992)("S. Rep.").

DBS service similarly has fallen short of its pledges. In its 1982 Report and Order establishing interim DBS service rules, the Commission noted that it expected DBS broadcasters "to tailor their programming to [a] small audience with specialized tastes rather than to a least-common-denominator mass audience....[A] much wider variety of programming may be available." *Inquiry into the development of regulatory policy in regard to Direct Broadcast Satellites for the period following the 1983 Regional Administrative Radio Conference*, Report and Order, 90 FCC 2d 676, 681 (1982) ("*1982 DBS Report and Order*"). Yet today, much of what is shown on DBS systems consists of nationwide cable networks, not original niche programming. And much of what niche programming does exist is offered on a pay-per-view basis; this does not add diversity for those who cannot afford it. Finally, one of the three DBS providers is controlled by cable MSOs and thus does not add much to diversity of editorial control. *See generally* Paul Farhi, *Dishing Up the Business Gets Tougher*, Washington Post, September 6, 1995, at G1.

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[5]Judged by the standards used elsewhere to "count" the number of media voices in a market the number of cable voices is far fewer than the number of channels offered. *See, e.g.,* the multiple ownership rules, 47 CFR §73.3555(counting broadcast stations which an entity "directly or indirectly owns, operates or controls"); and the attribution rules contained therein, 47 CFR §73.3555, Note 2.

Moreover, the needs of non-English speaking groups and listeners with specialized tastes may be more easily met through existing FM subsidiary communications services. These well-established, terrestrial broadcast services include, but are not limited to "functional music, specialized foreign language programs, radio reading services...market financial data and news...[and] bilingual television audio..." 47 CFR §73.295. These services, unlike DARS, generally do not charge a subscription fee but are available for anyone who can purchase special receiving equipment.

II. THE COMMISSION SHOULD ENSURE THAT FREE, LOCAL BROADCAST RADIO REMAINS A VIABLE SOURCE OF NEWS, INFORMATION, AND ENTERTAINMENT, AND SHOULD IMPLEMENT WHATEVER SAFEGUARDS IT DEEMS NECESSARY TO PROTECT LOCAL RADIO.

MAP urges the Commission not to disregard its fundamental public interest goals of ensuring diversity and localism. To promote these goals, it must protect and maintain the vitality of local, terrestrial broadcast radio. This important, unique medium has become an essential part of modern life because it is ideally suited to serve the community and it is widely available at virtually no cost.

However, the Commission need not completely reject DARS simply because it will cause some economic injury to terrestrial radio. The Commission is required to consider the economic effect of a new service on existing broadcasters if there is strong evidence that a significant net reduction in service to the public will result. *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470 (1940); *Carroll Broadcasting Co. v. FCC*, 258 F.2d 440 (D.C. Cir. 1958).[6] The Commission

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[6]Although the Commission in 1988 discontinued its *Carroll* doctrine, whereby it had considered evidence of economic injury in individual licensing proceedings, it clarified one year later that its underlying policy goal of insuring service to all sectors of the country is unchanged and that this decision was limited to licensing matters only. *Policies Regarding Detrimental*

has refused to reject a new service where it found that the net reduction in service to the public was less than significant or where the evidence of such harm was merely speculative. *1982 DBS Report and Order*, 90 FCC 2d at 689.

MAP does not advocate rejection of the proposed DARS service, and leaves it for other parties to determine the degree of harm that may result to local radio. But it does urge the Commission to adopt whatever safeguards it finds necessary to protect the ability of local radio to continue to serve local communities.

A. Broadcast Radio Serves The Public Interest Because It Provides Communities With Local Programming And Is Available For Free To 100 Percent Of The American Public.

Terrestrial broadcast radio promotes the public interest in two very important respects. First, unlike DARS or other nationwide audio services, broadcast radio serves the public's need for local programming. Second, it is available for free to any citizen within range of a signal.

1. Terrestrial Broadcast Radio Serves Local Communities.

The Commission has long recognized that there is a "paramount right of the public in a free society to be informed and to have presented to it...different attitudes and viewpoints concerning...vital and often controversial issues which are held by the various groups which make up the community." *1949 Editorializing Report*, 13 FCC 1246, 1249 (1949). The Supreme Court has also determined that the public has a First Amendment interest in receiving the "widest possible dissemination of information from diverse and antagonistic sources," *Associated Press*

Effects of Proposed New Broadcasting Stations on Existing Stations, Memorandum Opinion and Order, 4 FCC Rcd 2276 (1989). *See also* Report and Order, 3 FCC Rcd 638 (1988). In his concurring statement, Commissioner Quello noted, "[T]he Commission will consider the impact of allocating additional stations on existing facilities, but only in the context of generalized rule makings to creating new services." 4 FCC Rcd at 2278.

v. United States, 326 U.S. 1, 20 (1945), which would be well-served by local broadcasters who are responsive to their community. Licensees are "proxies for the entire community, obligated to give suitable time and attention to matters of great public concern." *Red Lion Broadcasting v. FCC*, 395 U.S. 367, 394 (1969). "[T]he importance of local broadcasting outlets 'can scarcely be exaggerated, for broadcasting is demonstrably a principal source of information and entertainment for a great part of the Nation's population.' The interest in maintaining the local broadcasting structure does not evaporate simply because cable has come upon the scene." *Turner Broadcasting System v. FCC*, 114 S.Ct. 2445 (1994) *quoting United States v. Southwestern Cable Co.*, 392 U.S. 157, 177 (1968). *See also* 1992 Cable Act, §2(a)(10)(Local origination of TV programming is a "primary objective" and a "substantial government interest.").

It is indisputable that radio stations serve their communities of license, and it is unlikely that DARS could ever provide such services. As the Commission notes in the *NOPR*, "While listeners could turn to satellite DARS services for national programming and advertising, we believe that...local news, weather, traffic, and public affairs programming could not practically be provided via satellite DARS." *NOPR* at ¶19.

2. Terrestrial Broadcast Radio Is Available To Everyone.

Radio is also important because it is available for free to 100% of the American people. There are no monthly subscriptions or per-hour fees. The only investment for listeners is the negligible cost of purchasing a radio - not an expensive dish or decoder. Therefore, in effect, radio provides a fundamental level of service to the community - giving it local news, information, and entertainment like no other medium can. It prevents the creation of a class of information have-nots. Any degradation of radio service due to the effects of DARS would directly injure those listeners who rely solely on terrestrial radio.

B. The Commission Has The Authority To Fashion Safeguards To Protect Terrestrial Broadcast Radio In The Name Of Localism.

The localism issues in the Commission's implementation of DBS service closely resemble those in the present inquiry, and show that it is within the FCC's discretion to create safeguards which protect terrestrial radio. In implementing its interim DBS service rules, the Commission explicitly considered the effect of DBS on local broadcasting, but it shied away from rejecting the service altogether because it found the evidence concerning possible economic injury to local broadcasters was "inconclusive." *1982 DBS Report and Order*, 90 FCC Rcd at 691-92. Here, however, MAP does not ask the Commission to reject DARS. MAP only asks the Commission to create any safeguards it finds necessary to ensure that the quality of service provided by terrestrial broadcast radio is not compromised.

In *NAB v. FCC*, the U.S. Court of Appeals for the District of Columbia upheld the Commission's DBS service rules. *NAB v. FCC*, 740 F.2d 1190, 1198 (1984). The Court held that, in carrying out its statutory mandate to ensure a "fair, efficient, and equitable distribution of radio service," 47 USC §307(b), the FCC's "constituency to be served is people, not municipalities." *NAB v. FCC*, 740 F.2d at 1198. Although finding the Commission was justified in its decision that the "[Communications] Act does not entrench any particular system of broadcasting..." and therefore did not insulate broadcasters from DBS competition, the D.C. Circuit was careful not to "denigrate the importance of local programming to a national broadcasting system that is designed to serve the public interest." *Id.*[7]

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[7]The *NAB* Court reached a similar conclusion concerning the creation of safeguards to promote diversity goals. The Court determined that the Commission had acted within agency

NAB makes clear that, even in a decision to license a non-local service, the Commission can and should consider the impact on local programming. And it should license the new service with an eye towards serving people - including those people not subscribing to the new service.

Also, the Commission does not need to make a finding of "strong evidence" of a "significant net reduction of service," to create these safeguards. *See FCC v. Sanders Bros. Radio Station*, 309 U.S. 470 (1940). The standard must be met only for the Commission to reject a service outright. To institute competitive safeguards it need only find that the public interest would be served.

On several occasions, the Commission has fashioned safeguards in implementing new services, or at least has relaxed its prior regulations, with the goal of maintaining the quality of free, terrestrial broadcast service. For example, the Commission relaxed its radio ownership restrictions in 1992, finding that "radio's ability to serve the public interest in the spirit of the Communications Act" was "substantially threatened" by a decline in the economic viability of many licensees. *Revision of Radio Rules and Policies*, Report and Order, 7 FCC Rcd 2755, 2760 (1992)("*Radio Ownership R&O*").

An even stronger example may be the Commission's "must carry" rules, which the Commission created to protect the public's interest in receiving free, over-the-air television sig-

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discretion in relaxing temporarily the multiple-channel ownership rule for DBS while it continued to apply the rule to terrestrial broadcasters. *NAB*, 740 F.2d at 1206. The Court warned, however, that it reached this outcome based ***solely*** on the FCC's rationale that relaxing the rules was a necessary economic incentive to ensure that DBS came to its fruition. *Id.* at 1207. It did not endorse the FCC's alternative rationale that market forces were sufficient to ensure diversity in the video program market and DBS specifically. To that end, it noted that should experience prove that relaxing the ownership rules was not a necessary economic incentive for DBS, "ownership restrictions may become warranted." *Id.* at 1208.

nals. *See Amendment of Part 76 of the Commission's Rules Concerning Carriage of Television Broadcast Signals by Cable Television Systems*, Report and Order, 1 FCC Rcd 864, 865 (1986)("*1986 Must Carry R&O*").[8] In *Century Communications Corp. v. FCC*, however, the D.C. Circuit found that the FCC had not created a sufficient record to establish that the latest iteration of these rules was narrowly tailored and furthered a substantial government interest. *Century Communications Corp. v. FCC*, 835 F.2d 292 (D.C. Cir. 1987). In response, Congress reinstated the must carry rules and made explicit findings concerning the importance of local broadcasting. 1992 Cable Act, Pub.L. 102-385, §§4, 5, *codified at* 47 USC §§534, 535. The Senate Commerce Committee found that "television broadcasting plays a vital role in serving the public interest" and that "absent legislative action, the free local off-air broadcast system is endangered." S. Rep. at 41-42. Thus, by reinstating the must carry rules, Congress reaffirmed the importance of free, terrestrial broadcasting and the appropriateness of creating safeguards to ensure its quality.[9]

C. DARS May Pose A Threat To Radio Broadcasters Revenues From Both National And Local Advertisers.

As the Commission has acknowledged on several occasions, DARS may cause some injury

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[8]The D.C. Circuit had also found that an earlier version of the rules, *see First Report and Order* in Docket Nos. 14895 and 15233, 38 FCC 683 (1965), violated the First Amendment. *Quincy Cable TV v. FCC*, 768 F.2d 1434 (1985). The FCC's 1986 provisions adopted must carry rules for a temporary five year period. The Commission hoped that after this time viewers could use A/B switches and antennas to retrieve local broadcast signals. *1986 Must Carry R&O*, 1 FCC Rcd at 864.

[9]In *Turner Broadcasting System v. FCC*, 114 S.Ct. 2445 (1994), which challenged the 1992 Cable Act's must carry rules on First Amendment grounds, the United States Supreme Court found that these rules served important government interests, and remanded to the D.C. District Court the to determine whether they were narrowly tailored to serve those interests.

to free, over-the-air broadcast radio. *NOPR* at ¶13. The Commission has requested comments on the extent of these injuries to local radio. It notes that national advertising accounts for approximately 17% of radio advertising revenue, and local advertising accounts for 83%. *NOPR* at ¶16.

As a nationwide service, DARS will directly compete with radio stations for national advertisers. An advertiser could reach listeners nationwide using terrestrial radio, obtaining time on a station-by-station basis,[10] or alternatively, it could use DARS to reach a nationwide audience with a single advertisement. Moreover, DARS may be more useful to advertisers wishing to target specific, narrow listener or demographic groups, while local terrestrial broadcasters may be useful for advertisers that want to contact broader audiences. It is difficult, therefore, to estimate the degree to which advertisers will switch to DARS. But any business would consider competition for 17% of its gross revenues to be a serious threat.

Moreover, DARS threatens to reduce terrestrial broadcasters' revenues from local advertising. The old adage that broadcasters are in the business of delivering an audience applies here: successful DARS services would almost certainly draw audience away from local stations. As local stations' ratings decline, local advertisers may find it more cost effective to reach an audience through other media, such as local television, cable systems, or newspapers.[11] Thus, it does not matter that DARS directly competes with terrestrial radio only for national advertisers,

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[10]Some radio networks exist, yet they have very limited broadcast schedules and do not reach every market in the country.

[11]In 1992 the Commission noted that radio's share of local advertising dollars had been flat, compared to local television and cable, throughout the previous decade. "[L]ocal cable systems are increasingly aggressive in competing for local advertising dollars, and radio is often the direct target for that competition. *Radio Ownership R&O*, 7 FCC Rcd at 2759.

it may also hamper radio in its ability to draw local advertisers.

The impact of the competition from DARS may be greatest on small market and rural stations, because DARS applicants plan to compete most heavily for listeners in small and rural markets. Yet these are precisely those who will be least able to withstand any decline in revenues.

> [T]he outlook for small radio stations, which comprise the bulk of the radio industry, is particularly bleak. Industry revenue and profit are overwhelmingly concentrated in large radio stations....[T]he top 50 revenue producing stations, .5 percent of all stations, accounted for...an estimated 50 percent of total industry profit. At the same time, more than half of all stations, primarily those with less than $1 million in sales, lost money.

Radio Ownership R&O, 7 FCC Rcd at 2760. When fashioning appropriate safeguards, the Commission should pay special attention to the needs of terrestrial radio listeners in small and rural markets.

III. AS LICENSEES OF THE PUBLIC SPECTRUM, DARS OPERATORS SHOULD BE SUBJECT TO PUBLIC INTEREST OBLIGATIONS.

DARS operators promise the world, but they may deliver substantially less to the listening public if the Commission fails to impose public interest requirements upon them.

In its *NOPR*, the Commission asks whether DARS should be regulated as a common carrier (under Title II of the 1934 Communications Act), as a broadcaster (under Title III of the 1934 Communications Act), or as a non-broadcast entity which should not be subject to any regulation. *NOPR* at ¶¶22-26. Additionally, the Commission asks whether satellite DARS providers offering subscription services should be subject to public interest obligations similar to those imposed on broadcasters. *NOPR* at ¶27. While MAP believes that Title III is the most appropriate regulatory scheme for DARS, it understands that the Commission needs flexibility in designing appropriate regulations for new technologies. However, MAP urges the Commission to impose public interest obligations on DARS providers, regardless of the service's classification. DARS providers, like terrestrial radio broadcasters, will receive part of the public spectrum. Thus, in return for use of this scarce public resource, all DARS operators - regardless of classification - should be subject to public interest obligations.

A. Because DARS Uses The Public Spectrum, It Should Be Classified And Regulated As A Broadcast Service.

The Commission asks whether "licensees should be able to determine their own regulatory classification or whether there are reasons to justify requiring them to provide service in a particular manner." *NOPR* at ¶22. Specifically, the Commission seeks comment on its tentative conclusions that (1) "there does not appear to be a reason to impose common carrier status on [DARS] licensees" and that (2) "a requirement that all DARS licensees operate as broadcasters appears to be unwarranted and inappropriate." *NOPR* at ¶¶23-24.

Because DARS operators, like traditional broadcasters, use public spectrum to provide programming services to the public, MAP urges the Commission to regulate DARS under Title III and its corresponding public interest obligations.

Broadcasters are traditionally subject to public interest obligations. *See Red Lion Broadcasting*, 395 U.S. 367. In return for the scarce public spectrum allocated to broadcasters, licensees must open their facilities for use by federal and local political candidates and ensure that individuals who are personally attacked are provided the right to rebut. *See* 47 U.S.C. §§ 312 (a)(7), 315 (a).[12] *See also* 47 C.F.R. § 73.1920.[13] Furthermore, terrestrial broadcasters

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[12]Section 312 (a)(7) reads, in relevant part, that "[t]he Commission may revoke any station license or construction permit for willful or repeated failure to allow reasonable access to or to permit purchase of reasonable amounts of time for the use of a broadcasting station by a legally qualified candidate for Federal elective office on behalf of his candidacy."

must offer programming which focuses on local issues of concern to the community served. *See Red Lion Broadcasting*, 395 U.S. at 394.

Spectrum scarcity remains the fundamental principle which guides spectrum allocation. *See, e.g., Turner Broadcasting*, 114 S.Ct. 2445; *FCC v. League of Women Voters*, 468 U.S. 364 (1984); *FCC v. Midwest Video Corp.*, 440 U.S. 689 (1979). As *Red Lion* made clear, providers of communications services which use the public spectrum must, in return, offer the public some form of payment for its use. *See Red Lion Broadcasting*, 395 U.S. 367. Viewed as "proxies for the entire community," the *Red Lion* Court held that broadcasters are "obligated to give suitable time and attention to matters of great public concern." *Id.* at 394. The *Turner* Court only reinforced the scarcity rationale articulated in *Red Lion*. *See Turner Broadcasting*, 114 S.Ct. at 2456. When addressing the issue of whether broadcast jurisprudence applies to the cable industry, the Court stated:

> The justification for our distinct approach to broadcast regulation rests upon the unique physical limitations of the broadcast medium....As a general matter, there are more would-be broadcasters than frequencies available in the electromagnetic spectrum....The scarcity of broadcast frequencies thus required the establishment of some regulatory mechanism to divide the electromagnetic spectrum and assign

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Section 315 (a) reads, in relevant part, that "[i]f any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station."

These policies apply equally to cable operators. See 47 C.F.R. §§ 76.205, 76.209.

[13]Section 73.1920 (a) states, in relevant part, that "[w]hen, during the presentation of views on a controversial issue of public importance, an attack is made upon the honesty, character, integrity or like personal qualities of an identified person or group, the licensee shall, within a reasonable time and in no event later than one week after the attack, transmit to the persons or group attacked notification of the date, time and identification of the broadcast; a script or tape ... of the attack; and an offer of a reasonable opportunity to respond over the licensee's facilities."

specific frequencies to particular broadcasters.

Turner, 114 S.Ct. at 2456. Additionally, the *Turner* Court observed:

> [t]he inherent physical limitation on the number of speakers who may use the broadcast medium has been thought to require some adjustment in traditional First Amendment analysis to permit the Government to place limited content restraints, and impose certain affirmative obligations, on broadcast licensees....As we said in *Red Lion*, "where there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish...."

Id. at 2457, *citing Red Lion*, 395 U.S. at 390. Thus, as users of the public spectrum, DARS operators should be treated as broadcasters and be subject to public interest requirements.

B. The Commission Should Expressly Overrule Its *Subscription Video* Decision And Rule That Subscription Broadcast Services Are Subject To Public Interest Obligations.

Making an analogy between DARS and Direct Broadcast Satellite ("DBS") service,[14] the Commission asks whether its decision in *Subscription Video* limits its ability to regulate those DARS operators which plan to offer their programming on a subscription basis.[15] *NOPR* at ¶24. *See also Subscription Video*, 2 FCC Rcd 1001 (1987), *aff'd sub nom. National Association for Better Broadcasting v. FCC*, 849 F.2d 665 (D.C. Cir. 1988). In *Subscription Video*, the Commission determined that DBS is a non-broadcast entity and therefore not subject to any public interest obligations. The Commission based its ruling on two factors: (1) that DBS operators offer programming on a subscription basis and (2) that reception of DBS programming requires

[14]DBS is a satellite-delivered video technology, similar to DARS, a satellite-delivered digital audio technology.

[15]Three of the four DARS applicants plan to offer subscription services. *NOPR* at ¶ 22. The fourth applicant, Primosphere, proposes an advertiser-supported broadcast service. *Id.*

"special equipment;" *i.e.*, a satellite dish. *See Subscription Video*, 2 FCC Rcd at 1006. The Commission stated that DBS licensees do not "seek to maximize audience in the same way as conventional licensees.... [S]ubscription services are interested in maximizing revenues which may not necessarily mean maximizing audience." *Id.* at 1004. Additionally, the Commission reasoned that "employment of devices which limit the receipt and enjoyment of the service to a segment of the public are *prima facie* indicia of licensee intent that the service not be received by the public." *Id.* at 1004.

For reasons discussed below and in numerous other filings, MAP urges the Commission to expressly overrule *Subscription Video*. *See, e.g.*, Brief for Petitioner National Association for Better Broadcasting, No. 87-1198 (D.C. Cir. 1987). By ignoring the quintessential earmark of broadcasting; *i.e.*, the use of public spectrum by DBS operators, the Commission in *Subscription Video* merely identified distinctions without a difference. Both subscription-based communications operators and over-the-air broadcasters intend to reach the "general public." Both subscription service providers and terrestrial broadcasters simply want to increase profit margins, not limit audience size to "specific addressees." *Subscription Video*, 2 FCC Rcd at 1004. Furthermore, "special equipment" is a function of technological change over time and public familiarity with new technology. Thus, the Commission's conclusion that subscription, satellite-delivered technologies, like DBS, should not be regulated as broadcasters is dubious at best.

Basing the classification of a communications service on these distinctions ignores reality. First, offering digital radio on a subscription basis does not indicate that a DARS operator wants to limit its audience size, thereby exempting the service from regulation. A DARS operator may choose to offer its programming on a subscription basis because it wants to avoid the public interest requirements which would be imposed on the service if the operator opted for broadcast treatment. A licensee's intent is to ensure that the most advantageous regulatory scheme be applied to its service. Thus, if a DARS licensee perceives a regulatory advantage in charging consumers for its programming, the service will be subscription-based. Such manipulation of communications law should not go unexamined.

Second, in an industry where rapid technological change is the norm, it is ludicrous to classify communications services based on the highly subjective determination that one technology is "special" while another is "common." If this criterion had been applied to the nascent commercial television industry 50 years ago, even this quintessential example of broadcasting would have been found beyond the scope of Title III. Other communications services, such as teletext, require "special equipment," yet the Commission has nonetheless classified them as broadcasting. *See Telecommunications Research & Action Center v. FCC*, 801 F.2d 501 (D.C. Cir. 1986), *cert. denied*, 482 U.S. 919 (1987). In an age where personal computers, facsimile machines, pagers, and a host of other new communications technologies were unheard of only a few years ago, technological distinctions cannot be the basis of communications services classification.

The Commission need not perpetuate its erroneous *Subscription Video* analysis of subscription services. The Commission has the statutory and regulatory authority to revisit its decision in *Subscription Video* and reclassify subscription services as broadcast entities, so long as a reasoned explanation is provided. *See, e.g., NAB v. FCC*, 740 F.2d at 1201; *Chisholm v. FCC*, 538 F.2d 349 (D.C. Cir. 1976); *Philadelphia Television Broadcasting v. FCC*, 359 F.2d

282, 284 (D.C. Cir. 1966). Once the FCC "determines that a previously adopted position should be changed, it is incumbent upon [the FCC] to provide 'an opinion or analysis indicating that the standard is being changed and not ignored, and assuring that it is faithful and not indifferent to the rule of law.'" *Subscription Video*, 2 FCC Rcd at 1003, *citing Chisholm* 538 F.2d at 349.

Furthermore, despite the broad language used in *Subscription Video*, DBS providers are still subject to regulation. For example, licensing requirements apply with equal force to DBS operators as to over-the-air broadcasters. *See, e.g.*, 47 CFR §§25.110-25.163, 25.201-300. Similarly, DBS operators must comply with EEO requirements, just as broadcasters must. *See* 47 CFR §76.73. Thus, if DBS operators are subject to structural regulations like these, then DARS operators - communications providers ***not*** addressed in *Subscription Video* - can be subjected to both structural and programming regulation.

C. Even If The Commission Decides That DARS Providers Should Not Be Regulated As Broadcasters, They Should Still Be Subject To Public Interest Requirements.

The Commission also asks "whether satellite DARS providers offering subscription or non-broadcast services should also be subject to similar public interest obligations." *NOPR* at ¶27. Specifically, the Commission asks commenters to address "any constitutional implications of imposing such public service obligations in light of *Daniels Cablevision, Inc. v. United States*, 835 F.Supp. 1 (D.C. Cir. 1993), *appeals pending sub nom. Time Warner Entertainment v. FCC*, No. 93-5349 and consolidated cases (D.C. Cir. 1995). MAP asserts that, even if the Commission decides that DARS is a non-broadcast entity, there are many public policy reasons justifying the application of public interest requirements.[16]

As an additional speaker in the marketplace, DARS operators can add to the diversity of voices. As the Commission points out, DARS operators can "target niche audiences that have not been served by traditional local radio," including foreign language programming, unusual musical formats, children's programming, and other special interest programs. *NOPR* at ¶2. But DARS has other potential uses which may not be realized absent government intervention. For example, national political candidates would naturally opt for DARS advertising, since DARS provides a built-in nationwide audience. Similarly, national news shows, political debates and town hall meetings could all be aired on DARS. However, such political speech will not likely get airtime unless mandated by the Commission, despite the vital role political speech plays in our democratic process.

Daniels Cablevision is not a barrier to the FCC's imposition of public interest requirements on DARS operators. In *Daniels*, the Court summarily dismissed the 1992 Cable Act's provisions which required DBS operators to allocate four to seven percent of their transmission capacities to noncommercial, educational programming. *Daniels Cablevision*, 835 F. Supp. at 8. The Court held that DBS providers need not fulfill this specific set-aside because the record did not reflect a shortage of educational programming, nor was there evidence that DBS was acting anticompetitively and thus in need of regulation. *Id.* However, *Daniels* never reached the commonly-understood public interest obligations, including the political attack, equal time,

[16]Even if the Commission decides not to regulate subscription DARS as a broadcaster, the Commission can follow the model set forth in the Commission's regulation of low-power TV. *See* 47 C.F.R. §74.780 (making low-power TV stations subject to political broadcast and EEO requirements).

and reasonable access doctrines, which the Supreme Court has ***repeatedly*** found to pass constitutional muster. *See Turner Broadcasting*, 114 S.Ct. 2445 (1994); *Red Lion Broadcasting*, 395 U.S. 367 (1969).

Moreover, and in any event, *Daniels Cablevision* was wrongly decided. MAP believes that the Commission has the authority to impose a specific requirement for noncommercial, educational or other public interest programming on DARS operators.[17] As the Commission itself has argued, the set-aside at issue in *Daniels* is fully compatible with DBS licensees' First Amendment rights. Opening Brief for the FCC and the United States at 49-51, *Time Warner v. FCC*, No. 93-5349 and consolidated cases (D.C. Cir. 1995). Specifically, the FCC asserts that (1) the set-aside does not impose an "undue burden on DBS providers, since the statute specifies that no provider will have to employ more than 7 percent of its channel capacity to satisfy its obligations to carry educational and informational programming," and that (2) "because DBS providers use a portion of the scarce radio spectrum in order to distribute their programming," DBS operators should be subject to public interest obligations.[18] Opening Brief at 50-51.

Finally, MAP notes that, even if the Commission decides to auction public spectrum to DARS applicants, the Commission should impose public interest conditions on this lease of public space. Payment for a license does not render it immune from conditions. States issue licenses for driving and fishing and these licenses do not come without conditions - nor without payment

[17]For example, MMTC urges the Commission to require DARS providers to reserve one channel for "noncommercial public access," and one channel for "minority entrepreneurial access." MMTC Comments at 3-4.

[18]Insofar as DARS is analogous to DBS, and that Congress directed that DBS providers be subject to sections 312(a)(7) and 315(a), DARS should be treated similarly. See 47 USC §335.

of a fee by the licensee. Similarly, PCS licenses were not auctioned without conditions. Licensees must meet minimum technical and licensing requirements. *See Amendment of the Commission's Rules to Establish New Narrowband Personal Communications Services*, 8 FCC Rcd 7162, 7167-72 (1993). *See also Amendment of the Commission's Rules to Establish New Narrowband Personal Communications Services*, Second Memorandum Opinion and Order, 9 FCC Rcd 4519 (1994), Memorandum Opinion and Order, 9 FCC Rcd 1309 (1994). Thus, the auction of public spectrum does not immunize such licenses from conditions. DARS applicants should not be allowed to avoid their public interest obligations because the Commission needs to raise money by holding an auction of public spectrum.

Thus, classification of DARS is inconsequential. Regardless whether DARS is classified as a broadcaster, non-broadcast entity, or common carrier, because it uses public spectrum, it should be subject to public interest requirements.